

A Brutal Punishment: Australia's Sentencing of David McBride

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*Sometimes, it's best not to leave the issue of justice to the judges. They do what they must: consult the statutes, test the rivers of power, and hope that their ruling will not be subject to appeal. **David McBride**, the man who revealed that Australia's special forces in Afghanistan had dimmed and muddled before exhaustion, committed atrocities and faced a compromised chain of command, was condemned on May 14 to a prison term of five years and eight months.*

Without McBride's feats, there would have been no [Afghan Files](#) published by the ABC. The [Brereton Inquiry](#), established to investigate alleged war crimes, would most likely have never been launched. (That notable document subsequently identified 39 instances of alleged unlawful killings of Afghan civilians by members of the special forces.)

In an affidavit, McBride [explained](#) how he wished Australians to realise that "Afghan civilians were being murdered and that Australian military leaders were at the very least turning the other way and at worst tacitly approving this behaviour". Furthermore "soldiers were being improperly prosecuted as a smokescreen to cover [the leadership's] inaction and failure to hold reprehensible conduct to account."

For taking and disclosing 235 documents from defence offices mainly located in the Australian Capital Territory (ACT), the former military lawyer was charged with five national security offences. He also found Australia's whistleblowing laws feeble and fundamentally useless. The *Public Interest Disclosure Act 2013* (Cth) provided no immunity from prosecution, a fact aided by grave warnings from the Australian government that vital evidence would be excluded from court deliberation on national security grounds.

Through the process, the Attorney-General, **Mark Dreyfus**, could have intervened under [Section 71](#) of the *Judiciary Act 1903*(Cth), vesting the top legal officer in the country with powers to drop prosecutions against individuals charged with “an indictable offence against the laws of the Commonwealth”. Dreyfus refused, [arguing](#) that such powers were only exercised in “very unusual and exceptional circumstances”.

At trial, chief counsel **Trish McDonald SC**, representing the government, made the astonishing [claim](#) that McBride had an absolute duty to obey orders flowing from the oath sworn to the sovereign. No public interest test could modify such a duty, a claim that would have surprised anyone familiar with the Nuremberg War Crimes trials held in the aftermath of the Second World War. “A soldier does not serve the sovereign by promising to do whatever the soldier thinks is in the public interest, even if contrary to the laws made by parliament.” To justify such a specious argument, authorities from the 19th century were consulted: “There is nothing so dangerous to the civil establishment of the state as an undisciplined or reactionary army.”

ACT **Justice David Mossop** tended to agree, [declaring](#) that, “There is no aspect of duty that allows the accused to act in the public interest contrary to a lawful order”. A valiant effort was subsequently made by McBride’s counsel, **Steven Odgers SC**, to test the matter in the ACT Court of Appeal. **Chief Justice Lucy McCallum** heard the following [submission](#) from Odgers:

“His only real argument is that what he did was the right thing. There was an order: don’t disclose this stuff, but he bled, and did the right thing, to use his language, and the question is does the fact that he’s in breach of orders mean that he’s in breach of his duty, so that he’s got no defence?”

The answer from the Chief Justice was curt: Mossop’s ruling was “not obviously wrong.”

With few options, a guilty plea was entered to three charges. Left at the mercy of Justice Mossop, the punitive sentence shocked many of McBride’s supporters. The judge [thought](#) McBride of “good character” but possessed by a mania “with the correctness of his own opinions”. He suffered from a “misguided self-belief” and “was unable to operate within the legal framework that his duty required him to do”.

The judge was cognisant of the Commonwealth’s concerns that disclosing such documents would damage Australia’s standing with “foreign partners”, making them less inclined to share information. He also rebuked McBride for copying the documents and storing them insecurely, leaving them vulnerable to access from foreign powers. For all that, none of the identifiable risks had eventuated, and the Australian Defence Force had “taken no steps” to investigate the matter.

This brutal flaying of McBride largely centres on clouding his personal reasons. In a long tradition of mistreating whistleblowers, questions are asked as to why he decided to reveal the documents to the press. Motivation has been muddled with effect and affect. The better question, [asks](#) Peter Greste, executive director of the Alliance for Journalists’ Freedom, is not examining the reasons for exposing such material but the revelations they disclose. That, he argues, is where the public interest lies. Unfortunately, in Australia, tests of public interest all too often morph into a weapon fashioned to fanatically defend government secrecy.

All that is left now is for McBride's defence team to appeal on the crucial subject of duty, something so curiously rigid in Australian legal doctrine. "We think it's an issue of national importance, indeed international importance, that a western nation has such a narrow definition of duty," [argued](#) his defence lawyer, Mark Davis.

John Kiriakou, formerly of the Central Intelligence Agency, was the only figure to be convicted, not of torture inflicted by his colleagues during the clownishly named War on Terror, but of exposing its practice. McBride is the only one to be convicted in the context of alleged Australian war crimes in Afghanistan, not for their commission, but for furnishing documentation exposing them, including the connivance of a sullied leadership. The world of whistleblowing abounds with its sick ironies.

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